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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 232.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals, Fourth District.

Motion by the Defendant in Error to Dismiss.

J. R. McINTOSH, RICHMOND, VA.,
Counsel for Defendant in Error.

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Motion by the Defendant in Error to Dismiss.

Now comes the defendant in error, The Postal Telegraph-Cable Company, by J. R. McIntosh, counsel, and moves the court to dismiss the writ of error in this cause, (1) because this Court has no jurisdiction of the same; (2) if the motion is not sustained, then that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of

the writ it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon pending said writ of error.

STATEMENT.

On April 11, 1898, The Postal Telegraph-Cable Company, a corporation of New York, having accepted the provisions of the act of Congress, approved July 24, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Military Purposes," filed in the office of the clerk of the Superior Court of Guilford county, North Carolina, a petition, making the Southern Railway Company the sole defendant, to obtain by condemnation the right to construct, maintain and operate a telegraph line along and upon the right of way of the Southern Railway Company from a point on the State line between the States of North Carolina and Virginia, south to Charlotte, and from Greensboro, in Guilford county, to the city of Raleigh, and by amended petition filed by leave of court, same day, from Greensboro to Winston, in the county of Forsythe.

This petition was filed under the provisions of Chapter 49, of the Revised Code of 1883, of North Carolina, and under Sections 2007 and 2013 of said Chapter, which provides that any telegraph company incorporated in North Carolina or any other State shall have the right to construct, maintain and operate lines of telegraph along any railroad in that State, to be so constructed and maintained as not to obstruct or hinder the usual travel on said railroad, upon making just compensation therefor; and further providing in what manner proceedings for condemning such a right should be conducted.

The Southern Railway Company, a corporation of Virginia, appeared and filed its petition for removal on the ground of diverse citizenship, and such proceedings were had that the case was removed into the Circuit Court of the United States for the Western District of North Carolina, (Opinion of Judge

Simonton, 88 Fed. Rep., 303). The railway company resisted the proceedings upon various grounds, among others that there was no law in North Carolina providing for the condemnation of land for rights of way for the use of telegraph companies; that if there was such a law, the petition of the telegraph company did not in essential particulars follow it; and that the petition was too vague and uncertain in its statements of the nature of the tenure by which the railway company held the right of way over which the easement for the telegraph company was sought to be condemned. These objections were overruled (Opinion of Judge Simonton, 89 Fed. Rep., 190), and the Court ordered, on Sept. 15, 1898, as provided by Sec. 1945 of the North Carolina Code of 1883, that three commissioners be appointed to assess the damages which the railway company would sustain by reason of the erection of the petitioner's telegraph line in the manner proposed, and that they should hear the testimony and make their report in writing, and file it with the Clerk of the Court.

Subsequently, upon the petition of the railway company, leave was granted to it, to answer the petition of the telegraph company, and the order for the appointment of commissioners was suspended. A demurrer interposed by the telegraph company to the answer, was sustained. (Opinion of Judge Simonton, 90 Fed. Rep., 30), and by order of Oct. 24, 1898, reinstated the order appointing commissioners. To the granting of these orders, the railroad company applied to Judge Simonton for writ of error and *supersedeas*, which was refused on the ground that no appeal was admissable to the United States Circuit Court of Appeals, except from a final order or decree, and that the orders and judgments complained of, were not final, but merely interlocutory, (opinion of Judge Simonton, Vol. 90 Federal Rep., 211.) Afterwards, upon application to Judge Goff, by the railroad company for *a rehearing*, he set aside the order of Judge Simonton, refusing a writ of error, and granted a writ of error to bring the case before the U. S. Circuit Court of Appeals, when the

defendant in error moved to dismiss the same for the want of jurisdiction, on the ground that the order appealed from, was not a final, but an interlocutory one. The motion was argued before that Court, February 18, 1899, and decided March 30, 1899, sustaining the motion, and dismissing the writ of error for want of jurisdiction, (opinion by Judge Morris, not yet reported, but printed on page 114 of original transcript of record filed in this cause.)

Afterwards, Judge Goff made an order, reinstating the former order of Judge Simonton for the appointment of commissioners, and directing the clerk to summon the commissioners, upon notice to the parties, for the purpose of assessing the damages to which the railway company was entitled, which was accordingly done, and the damages were assessed pursuant to said order by said commissioners, on the 21st day of April, 1899, and their report was filed with the clerk of the court, as directed by the order of Judge Simonton, of Sept. 15, 1898. And, immediately upon the filing of the report, the telegraph company paid to the clerk, for the Southern Railway Company, the amount of damages assessed by said commissioners, taking his receipt therefor, and at once commenced the construction of its telegraph line, as authorized under Sec. 1946 of the Code of North Carolina, and continued on said work until interrupted by *supersedeas* upon the writ of error now pending in this court.

OBJECT OF THE MOTION.

The object of the motion is to have the writ of error in this case dismissed for the want of jurisdiction; but if the motion be overruled or for any cause continued, then to have the *supersedeas* upon the writ of error so modified as to authorize the Defendant in error to occupy the right of way involved in the proceedings and to work thereon pending the writ of error.

ARGUMENT.

The only error of which the Plaintiff in Error can in this

Court be heard to complain, is the ruling of the United States Circuit Court of Appeals, Fourth Circuit, in dismissing the writ of error before it to the Circuit Court for the Western District of North Carolina. Was that error? If it is apparent on the record that the Appellate Court has no jurisdiction on the appeal, it will dismiss it without any motion for that purpose, even if both parties oppose it. In such case the appellant may, of course, have it dismissed on motion thereafter, even though it be resisted by the appellee.

Bruner v. *United States*, 11 How., 163.
Sampson v. *Walsh*, 24 How., 207.
Burnham v. *First National Bank*, 100 U. S. App., 485.
Merriman v. *Petty*, 16 Wall., 338.
Latham's App., 9 Wall., 185.

This proceeding is authorized by the opinion of this court in the case of *E. Tenn., Va. & Ga. R. R. Co.* v. *South Tel. Co.*, 112 U. S. Rep., 306, et seq. That was a condemnation proceeding by the *Telegraph Co.* v. *R. R. Co.*, commenced in the Probate Court of Montgomery county, Ala., and removed to the Circuit Court of the United States for the Middle District of Alabama, where compensation was assessed by a jury and the amount paid to the clerk of the court.

From that judgment a writ of error was brought to this court, when the Telegraph Company moved to dismiss the writ, because, 1, the value of the matter in dispute did not exceed $5,000.00, and if the motion was not granted, then, 2, that the *supersedeas* might be modified so as to allow it to occupy the right of way involved in the proceeding, and to work thereon, pending the writ of error.

Chief Justice Waite, in delivering the opinion of the Court (page 310), said: "The Courts of the United States, on the removal of the proceedings from the Probate Court, were clothed with no greater power in the premises, than the courts of the State would have possessed, if their jurisdiction had been preserved. It follows that, as an appeal from the Pro-

bate Court to the State Court or to the Supreme Court would not have operated to prevent the Telegraph Company from taking possession of the property appropriated, and erecting its wires, pending the appeal, the supersedeas on the writ of error from this Court to the Circuit Court of the United States should be limited in the same way. This provision of the statute is by no means an unusual one, and was intended to prevent delays in the progress of a public work while the parties were litigating in the higher Courts as to the correctness of a preliminary assessment of compensation to be paid an owner of property taken for the public use according to the forms of law."

The judgment of this Court was:

> "*The motion to dismiss because the value of the matter in dispute does not exceed $5,000.00 is denied; but it is ordered that the supersedeas upon the writ of error from this court shall not, during the pendency of the writ, prevent or hinder the telegraph company from occupying the premises appropriated for its use, and proceeding to erect and operate its line of telegraph thereon, after it has paid into the Circuit Court, for the person or corporation entitled thereto, the amount of damages and compensation assessed by the jury empannelled in the Circuit Court.*"

In the first place, I insist that there was no error in the ruling of the United States Circuit Court of Appeals, to which this writ of error was taken. The principle is beyond dispute, that if a court has no jurisdiction, consent cannot give it, and any judgment or decree entered by it would be void.

The jurisdiction of the United States Circuit Court of Appeals is fixed by statute. "The Circuit Court of Appeals has jurisdiction, under the act creating it, only of final judgments or orders of the Circuit or District Court." Sec. 6, Act of Congress, creating Circuit Courts of Appeal.

His Honor, Judge Simonton, in his opinion of the 9th of November, 1898 (Vol. 90, Fed. Rep., 211), held that the orders

pealed from by the writ of error, were not final, but merely erlocutory; from which the right of appeal did not lie, ing:

Bostick v. *Brickerhoff*, 106 U. S., 3.
Life & Fire Ins. Co. of N. Y. v. *Adams*, 9 Pet., 571.
Lata v. *Kilbourne*, 150 U. S., 524.
Burlington v. *Simms*, 153 U. S., 52.
In re Palmyra, 10 Wheat, 502.
Chase v. *Vasques*, 11 Wheat, 429.
Luxton v. *North River Bridge Co.*, 147 U. S., 341.

His Honor, Judge Morris, delivering the opinion of the urt of Appeals, on the 30th of last March (which is not yet ported, but is printed on page 114 in the original transcript this cause filed in this court), sustaining the ruling of Judge monton, and dismissing the writ of error for want of juris-ction, said:

"The contention of the plaintiff in error is that it is not pealing from the order of appointing commissioners, but om the action of the court below in refusing to allow it to troduce testimony to sustain its contention that the pro-sed telegraph line could not be so constructed and operated not to obstruct and hinder the usual travel upon the rail-ad.

"Its contention is that in an adversary proceeding in court r condemnation there are two separate and successive pro-edings. The first of which determines the right to con-emn, and the second the amount of compensation; and that e first of these, even when the right to condemn is sustained, a final and appealable judgment, although not made so by atute.

"There can be found no case in the decisions of the Su-reme Court of the United States which has so held. In the se of *Belmont Bridge* vs. *Wheeling Bridge*, 138 U. S., 287, the upreme Court did hold that the judgment in that case for the ondemnation was a final appealable judgment, but this was

solely upon the ground that the case came to the Supreme Court by writ of error to the Supreme Court of Appeals of West Virginia, and that it had been held by that court that the judgment was final under the West Virginia statute. Mr. Justice Field said: 'The judgment appears to have been considered as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light in exercising an appellate jurisdiction.'

"In *Luxton* vs. *North River Bridge Co.*, 147 U. S., 337-342, Mr. Justice Gray, commenting on the ruling in the case just above quoted, said: 'To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of validity of the condemnation except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the Circuit Court of the United States.'

"Even if the fact was pertinent, in condemnation proceedings under the provisions of the State law when conducted in a Circuit Court of the United States, that the State Court had held the appointment of commissioners to be a final appealable order, the plaintiff in error cannot have the benefit of such a contention in the present case, for the reason that the Supreme Court of North Carolina has decided to the contrary with respect to the very statute under which these proceedings were taken. In *American Union Telegraph Company* vs. *Wilmington, &c., Railroad Company*, 83 N. C., 420, the Supreme Court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendants' railroad, that no appeal was allowable from the order adjudging that the petitioner

ntitled to the right of way demanded and appointing ssioners to ascertain and report the compensation to be the defendant railroad as damages for the condemned ty. The court said 'upon a careful examination of the , and the portions of the act of February 8, 1872, by ace incorporated with it, and regarding the policy indi- n both to favor the construction and early completion of orks of internal improvement, telegraphic being upon ne footing as railroad corporations, we are of opinion it t intended in these enactments to arrest the proceedings ized by them at any intermediate stage, and the appeal ly from a final judgment. Then and not before may any committed during the progress of the cause and made bject of exception at the time be reviewed and corrected appellate court, and an appeal from an interlocutory is premature and unauthorized.'

Hendrick vs. *Railroad*, 98 N. C., 431, the Supreme Court rth Carolina again held that under the law of that State der appointing commissioners to assess damages is inter- ry, and no appeal will be entertained until after final ent upon the report of the commissioners, and said: case is in all material respects like *Telegraph Co.* vs. *The Co.*, 83 N. C., 420; *Commissioners* vs. *Cook*, 86 N. C., 18; *ad* vs. *Warren*, 92 N. C., 620. They settle the course of ce in such proceedings as the present one and sufficiently he reasons for it.'

case of *Luxton* vs. *North River Bridge Co.*, 147 U. S., 41, above cited, is, we think, conclusive of the present on, for in that case it was held by the Supreme Court of nited States that although the proceedings in the Circuit of the United States were directed by the Act of Con- o be according to the laws of the State within which the o be condemned was located, and by that State law the ntment of the commissioners could be reviewed by the me Court of the State on writ of *certiorari*, yet so much State law as allowed such review was inapplicable to a eding in the Circuit Court of the United States. The

ourt said: 'The case throughout, from the application of the orporation for the appointment of commissioners to assess amages to the owner of the land proposed to be taken, until dgment upon the award of the commissioners or upon verdict a jury, assessing those damages, remains in the Circuit Court f the United States and under its supervision and control. he action of that court in this case, as in other cases on the ommon law side, is not reviewable by this court by writ of rtiorari. *United States* vs. *Young*, 94 U. S., 258; but only by rit of error, which does not lie until after judgment disposing f the whole case and adjudicating all the rights, whether of tle or of damages, involved in the transaction. The case is ot to be sent up in fragments by successive writs of error.'

" Act of September 24, 1789, Ch. 20, sec. 22, 1 Stat. 84. ev. Stat., Sec. 691.

"*Rutherford* vs. *Fisher*, 4 Dall., 22.
"*Halcombe* vs. *McKusick*, 20 How., 552, 554.
"*Louisiana Bank* vs. *Whitney*, 121 U. S., 284.
"*Keystone Co.* vs. *Martin*, 132 U. S., 91.
" *McGourkey* vs. *Toledo & Ohio Railway*, 146 U. S., 536."

I respectfully submit, that for the reasons stated in the pinions of Judges Simonton and Morris, as well as numerous ther authorities, which I deem unnecessary to cite, this court hould sustain the motion to dismiss the writ of error. If for ny reason, however, it is not done at this time, then, under he authority of the case of *E. Tenn., Va. & Ga. R. R.* v. *outhern Tel. Co.*, *supra*, the supersedeas should be so modified s in the language of this court, in that case: " *It shall not, uring the pendency of the writ prevent or hinder the telegraph com-any from occupying the premises appropriated for its use and pro-eeding to erect and operate its line of telegraph thereon, after it has aid into the Circuit Court, for the person or corporation entitled ereto, the amount of damages and compensation assessed by the ry empanelled in the Circuit Court.*"

1946 of the Code of North Carolina of 1883, is ex-
vided :

company, at the time of appraisment, shall pay into
n appraised by the commissioners, then, under that event,
pany may enter, take possession of and hold said lands,
ing the pendency of appeals, and until the final judgment
said appeal or appeals." Thus bringing this case
ain the rule laid down in the case in 112 U. S.,

reme Court of North Carolina, in the case of *Com-*
. *Cook*, 86, N. C., 18, says :

roceeding for the condemnation of land, for work
mprovements, is intended to be summary and direct,
ful purpose in facilitating the proposed work would
if the progress of the work could be arrested by
wholly needless in this incipient stage for the pro-
any right or interest of the unwilling land owner.
of the prompt method of procedure in such cases
the delay and interruptions incident to an ordinary
promote the completion of the authorized public
nt

se is not in principle distinguishable from that of
R. R. Co., 83 N. C., 420; and as was then decided,
hold that the appeal of the defendant is premature
e dismissed."

e of North Carolina stands in the front rank of the
is great Union in the way of progress. The hun-
anufacturing industries all over the State attest this
er courts have kept in line with the progress of her
The Supreme Court of North Carolina has held that
on to restrain condemnation proceedings, even be-
es are assessed, will be granted where bond is given
fy the land holder against damages that may accrue
of the public improvement.

Wellington & Powellsville R. R. Co. v. *C. & C. R. R. Co.*, 116 N. C., 924; also 114 N. C., 690, and 99 N. C., 11. A *fortiori*, if an injunction would not lie, in this case, under those circumstances, a *supersedeas* should not be allowed at this stage of this proceeding.

SUPERSEDEAS BOND.

I respectfully submit, should this case linger in this court for one, or two, or five years, and then be dismissed, the telegraph company could recover only nominal damages upon the supersedeas bond, for the reason, that it could not recover for any speculative damages, that is, profits that would have accrued to it during the time, had its line been constructed without interruption, such would be *purely speculative*, hence the supersedeas bond is no protection to the telegraph company.

I have filed with the clerk of this court a certified copy of the proceedings of the assessment of damages at Greensboro, N. C., on the 21st of April, 1899, showing that the damages were assessed; I also file a receipt of the clerk to the Telegraph Company, showing that the amount was paid to the clerk of the court for the Railway Company.

Respectfully submitted,

J. R. McINTOSH,

Counsel for Defendant in Error.